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NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

BRUCE E. MARTIN

PETITIONER

V.

UNITED STATES OF AMERICA

UNITED STATES NAVY

RESPONDENTS

PETITION FOR WRITE OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

The Constitutional right of those accused in mental disorder to have Fifth Amendment Constitutional process under the legal "Residuum Rule" in adverse administrative actions under authority of the Administrative Procedure Act and the Civil Service Reform Act.

The Constitutional right to have Sixth Amendment Constitutional Process in adverse administrative actions where the government has a exception to the hearsay rules of evidence under authority of the Administrative Procedure Act and Civil Service Reform Act.

The Constitutional right to have Seventh Amendment Constitutional Process in actions against the United States Government under

Authority of the Equal Employment Opportunity Act, Tort Claims Act, and Employee's Compensation Act where Congress has waivered the sovereign immunity of the United States and made the government liable the same as a private individual.

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THE PETITIONER BRUCE E. MARTIN RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGEMENT AND OPINION OF THE NINTH CIRCUIT COURT OF APPEALS ENTERED IN THIS PROCEEDING ON MAY THE 14th, 1982.

OPINIONS BELOW

The Equal Employment Opportunity Commission Decision no. 03800098 dated May 21st, 1981 is printed at pages A-1 to A-55, Infra, and is not officially reported. The Order of the United States Department of Labor dated May 18th, 1982, is printed at pages B-1 to B-3, Infra, and is not officially reported. The Decision and Order granting Motion for Summary Judgement of the United States District Court for the District of Hawaii dated August 28th, 1981 is printed at pages C-1 to C-23, Infra, and is not officially reported. The Opinion of the Ninth Circuit Court of Appeals affirming the Order Granting Summary Judgement dated May 14th, 1982, is printed at pages D-1 to D-3, Infra, and is unpublished. The Order of the Ninth Circuit denying Petition for Rehearing dated June 7th, 1982, is printed at Page E-1, Infra, and is not officially reported.

JURISDICTION

The Judgement of the Court of Appeals for the Ninth Circuit was entered on May 14th, 1982. A timely petition for rehearing was denied on June 7th, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is involked under Title 28 U.S.C.S. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND AMENDMENTS

AMENDMENT FIVE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice

put in jeopardy of life or limb: nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law: nor shall private property be taken for public use, without just compensation.

RAISING THE FEDERAL QUESTION

The United States Court of Appeals for the Ninth Circuit rewrites the holding of other circuit courts in the following cases of point: Burch vs: Carmody 377 F Supp 1157, Colgrove vs: Battin 93 S Ct 2448, Curtis vs: Loether 94 S Ct 1005, Elliott H. Velger vs: Donald F. Cawley, Police Commissioner, City of New York, 525 F 2nd 334, Eugene C. Cambell vs: United States of America 307F 2nd 597, Hurley vs: Van Lare 380 F Supp 167, Lombard vs: Board of Education of the City of New York 502 F 2nd 631, McDonal vs: United States, McNiel vs: Butz 480 F 2nd 314, Milton O.

Pelisek vs: Trevor State Graded School District No. 7 of the Town of Salem, Kenosha County, Wisconsin, Morris vs: United States 217 F Supp 220, Picking vs: Pennsylvania R. Co, Rainbow Val. Citrus Corp. Vs: Federal Crop Ins. Corp. 506 F 2nd 467, Rewis vs: United States of America 503 F 2nd 1202, Sawyer vs: Hauck 245 F Supp 174, and United States vs: Quicksey 525 F 2nd 337.

This transparent decision reflects the government's consistent reluctance to accept the Court's premise in the above mentioned case of point, that "the right to hold specific employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." The entire focus of the Plaintiff's 5th Amended Complaint

is the deprivation of this fundamental right to a job by virtue of an unauthorized administrative procedure upholding the fase imputation of mental disorder without trial or due process of law in violation of his constitutional and civil rights.

The government's attempt by truncated quotation to shift away from constitutional rights to administrative procedures bares the flaw in its opposition to the instant federal case.

The Constitution of the United States of America can not be written so as to decide merely what the government now says it means. The Plaintiff contends that there are procedural infirmities in the hearing which preceded the final revocation of his employment with the United States Government which are in direct conflict with the 5th and 6th Amendments. The government's only claim

is that it can provide a new procedure free of such defects in federal employment discrimination.

Where constitutional rights of liberty or property are alledged to be infringed by administrative action, some courts have held that due process of law requires independent judicial determination of constitutional question and have rejected the "substantial evidence" rule as a sufficient standard of review in such situations. The rule is applied to "constitutional" or "jurisdictional" facts as to which a trial de novo in the courts has been held necessary.

The Plaintiff rejects the government's argument that administrative procedures are the sole issue, in the instant case and therefore submits that he has been illegally deprived of his job. Wherefore, the Plaintiff has been deprived of his liberty and property rights under the 5th Amendment he is entitled

to be made whole for the resulting damages. Merely providing presidential authorization or curing procedural defects does not erase the past deprivations of liberty and property rights or eliminate the obligation to make restitution for losses suffered.

The information and substantiality of the federal questions presented have been denied by the Defendants. The Plaintiff's claim in his 5th Amended Complaint is against the blatant and predicated violation of his civil rights by the United States through its malicious and negligent abuse of police force.

The review of the Government's Administrative Procedures is relevant to the restitution of the Plaintiff's liberty and of itself raises significant issues justifying the grant of jury trial.

In light of the inability of the government to face the issues in the Plaintiff's 5th Amended Complaint without grossly distorting the material facts, the plenary review of the Opinion of the Ninth Circuit Court is indisputable: indeed, Plaintiff suggests that either declaratory or in alternative interlocutory judgment in his favor is now in order.

STATEMENT OF THE CASE, PART I

1. The abuse of police force and denial of due process of law.
2. During the times herein mentioned the Defendant was the Chief of Police at the Naval Base Police Department, Pearl Harbor.
3. On or about 1977-1978 the Plaintiff was a law enforcement officer at the Naval Base Police Department, Pearl Harbor.
4. The Defendant negligently denied the Plaintiff due process of law and committed

the act of abuse of police force by the malicious use of libel, slander, and defamation of character when he submitted the Statement of Observed Facts to Dr. Leonard S. Jacobs, Suite 511, 1110 University Avenue, Honolulu, Hawaii for the express intentions of sabotage and character assassination.

5. The Defendant stated that the Plaintiff had in fact committed the following crimes:

   1. 4 counts of terroristic threats, assault (dangerous weapons) Title 18 Section 111 United States Code of Justice.
   2. 2 counts of terroristic threats, assault Title 37, Chapter 707 Section 715 Hawaii Revised Statutes.
   3. 2 counts of threatening communications (terroristic) Title 18 Section 3239,

United States Code of Justice.

6. The above Defendant Louis L. Pagen stated that the Plaintiff was in fact:

   1. Dangerous;
   2. Aggressive;
   3. Hostile;
   4. Violent;
   5. Lacked Judgment;
   6. Lacked Self-control.

7. The Plaintiff was forced to submit to psychiatric interrogations under threats of termination of employment by order of the Defendant, Louis L. Pagan (interrogations performed on or about the 8th of September 1978 by Dr. Leonard S. Jacobs--under contract to the United States Government).

8. The Plaintiff was found and given the verdict of guilty and made to be responsible for the above mentioned crimes

(without trial and due process of law) in violation of his constitutional rights, the 5th and 6th Amendments to the Constitution of the United States of America.

9. By reason of the Defendant's negligence the Plaintiff suffered the following injuries and damages:

   1. Loss of a career as a law enforcement officer $350,510.17.
   2. Pain and suffering (mental anguish-psychological injury and damage* marked depression) $300,000.00.
   3. 2000 hours of legal research and litigation at $55.00 dollars per hour for a total of $110,000.00.
   4. $239,489.83 for taxes to cover the cost of compensation.
   5. In conclusion, the Plaintiff suffered a total of $1,000,000.00 dollars of

injuries and damages as a direct result of the Defendant's negligence and abuse of police force by denial of due process of law to the Plaintiff in violation of his constitutional and civil rights.

10. Prior to the damages and injuries inflicted by the Defendant's negligence and malicious abuse of police force by denial of due process of law the Plaintiff, Bruce E. Martin, was a productive officer with good job performance and adequate judgment.

    1. The Plaintiff was courteous to people, some of whom were high on drugs or who were quite beligerent.
    2. The Plaintiff had success in preventing physical violence from occurring.
    3. In his career the Plaintiff was a productive officer and cited over

200 people for problems.

WHEREFORE the Plaintiff prays for judgment in the principal sum of $890,000.00 plus interest from the 8th of September 1978 and court costs, and the sume of $110,000.00 for legal fees plus interest from the 8th of September 1978.

s/ Bruce E. Martin
Plaintiff

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STATEMENT OF THE CASE, PART II

The government's psychiatric examination of the Plaintiff is founded on the premises and principle that Plaintiff did for a fact commit hostile and violent acts against his fellow police officers, that he was aggressive and lacked self control. None of these allegations have been proven in a court of law, nor has the Plaintiff been charged for that matter. Testimony of a medical expert, like that of any other witness, concerning mental disease of a person may be excluded if it reports mere opinion, unsupported by underlying facts. An expert may testify on a person's capacity to distinguish between right and wrong, but he may not be compelled to testify in these terms if he believes they are essentially moral and legal considerations beyond scope of his special competence as a

behavioral scientist. No man should be held responsible for mental disorder unless he is charged in a mental proceeding and has due process of law. Particular proceedings before an administrative agency have been held civil rather than criminal in nature even though the charge before the agency is based upon a violation of the penal code, however, in such cases fairness may require the observance of salutary purposes behind certain rules of criminal procedure. Every man is entitled to equal protection under the law. The Constitution of the United States of America is based on the fundamental principles of free men as set forth in 1215 A.D. by the King's Magna Carta. The 5th Amendment to the United States Constitution limits the power of government in favor of the common people and extends the rights of

men to be free, to have life, liberty, and his property. This independence and freedom is fundamental to any democratic society.

The United States Government's psychiatric evluation was based on speculation, not the material facts of the case. The examination was performed in less than two hours by only one doctor in medicine. Ordinarily an accurate and reliable psychiatric examination would require a series of physical exams as well as mental tests extending into a period of months before any plausible determination could come to conclusion in an expert opinion. The Government's psychiatric evalution was made in haste without any consideration for the Plaintiff's consent who was forced under threat of immediate termination of employment.

Prior to the Government's psychiatric examination of your Petitioner his supervisor,

Louis Pagan, the Chief of Police, who was in employment by the United States Navy through the Government's Civil Service, submitted to the Government's psychiatrists who was under contract by the Navy, M.D. Leonard S. Jacobs, a three page document entitled "Statement of Observed Facts". This document of the Naval Base Police Department, Pearl Harbor was based on hearsay and conclusory allegations. In a court of law the opinion of a medical expert as to the mental competence of a person in either a criminal or civil proceeding based upon the statements of third persons out of court is generally inaddmissible under the rules of Federal evidence. None of the testimony given to the Government psychiatrists was ever witnessed by the Chief of Police who had made his statements with prejudice. In the statements made on behalf of the Naval Base Police Department, the Chief of Police

made a millennium of references to police reports submitted to him by three radically prejudiced Japanese police officers, James A. Takata, Kuichi Takayama, and Irino Cabanatan, who were co-workers with the Petitioner, a Caucasian. Prior to their statements to the Chief of Police each of these prejudiced police officers had made a multitude of physical threats against your Petitioner. All of these incidents were in due process reported to the Chief of Police by your Petitioner without any corrective legal action by the Naval Base Police Department in violation of Federal law. After numerous racial confrontations between the Petitioner and Japanese officers the Chief of Police requested the Commander of Naval Base Pearl Harbor, Captain Allen Shapero, to remove the Petitioner's employment from the United States Navy and

submitted as cause false allegations of violent conduct by Petitioner. Supervisors and staff members of the Naval Base Police Department were induced by the Chief of Police to take part in active co-conspiracy to violate the Petitioners constitutional and civil rights. By instrument of subversive influence, derogatory statements, and fabrication of police reports and documents, the Naval Base Police Department did through the power of the United States Government assassinate Petitioner's character, wherefore, he was deprived of his liberty and property right to practice his chosen profession of law enforcement without the requisite constitutional safeguards of trial and due process of the law. This basic right founded upon the constitution to practice one's chosen profession without unreasonable governmental interference is fundamental to

your Petitioner's freedom, independence, and liberty.

FIRST ARGUMENT

There are no cases before the Supreme Court of the United States where the Court's opinion, stated the extent of judicial review in terms of the Legal "Residuum Rule". The status of the Legal "Residuum Rule" is by no means clear in the Federal courts since Congress in the administrative procedure act has explicitly avoided the requirement of competent evidence to support findings of fact.

The leading case decided by a state court, which announced the "Residuum Rule" in Carol vs. Knickerbocker Ice Co, 218 NYS 435. This leading New York case in 1916 laid down what has come to be known as the legal "Residuum Rule". Under this rule, even though an administrative agency is not

bound by the rules of evidence applicable in court, and even though the agency may in its discretion accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the finding of the administrative agency. In other words, a determination in a quasi-judicial proceeding or upon a hearing or one requiring support in "substantial evidence" must be based on some evidence which is competent and legal, as tested by the usual rules for producing evidence in any legal proceeding. If founded only on hearsay or other improper evidence, the decision will not be sustained. The competency of testimony offered in support of or against any material fact is a question of law, upon which the courts may substitute their own judgment for that of the administrative authority. The Court stated in Shield vs. Hults 250 NYS 2nd 143 under

administrative law that it is generally considered, under the legal "Residuum Rule", that a finding is not substantially supported absent the presence of at least a residuum of evidence competent under the exclusionary rules; for example there is no substantial support for a finding if there is no evidence in support thereof except hearsay evidence.

In another case of point the residuum rule is described in 36 ALR 12 Section 7 Jacobowitz vs. United States of America 424 F 2nd 555 under administative law where the Court said that even though uncorroborated hearsay may have some probative value, it may lack sufficient probative force, standing alone, to constitute evidence that will support a decision of an administrative agency.

The Court has stated in Erman vs. Ingraham 280 NYS 2nd 865 that receipt and

consideration by an administrative agencies of hearsay evidence, without opportunity for the aggrieved party of cross-examination, is to deprive such party of a fair trial. U.S.C.A. Const. Amend 6.

When the "Residuum Rule" is rejected and a finding is based on hearsay, the result is to deny a party the right to cross-examination. The Supreme Court has stated in Goldberg vs. Kelly 90 Sct 1011 that in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. The Court stated in another case, Capobianco vs. United States 394 F 2nd 515 under constitutional law that where hearsay constitutes a major support for the administrative decision, the situation may possibly verge on deprivation of due process.

SECOND ARGUMENT

1. On the 8th of September, 1978 and for several years prior thereto, Petitioner was a Civil Service Employee of the Naval Base Police Department, Pearl Harbor.
2. On or about the 20th of October, 1978, charges were preferred against Petitioner by the Chief of Police, Alexander J. Poniatowski, Respondent, for misconduct, violation of the rules, neglect of duty; pending the disposition of said charges, Petitioner was immediately terminated.
3. On the 20th of December, 1974, by resolution, Respondent, authorized the Merit Systems Protection Board to conduct the hearing on said charges.
4. Thereafter hearings on said charges were had before Roy T. Takai, Hearing Officer for the Merit Systems Protection Board

on the 1st of August, 1979.

5. After such hearing said Merit Systems Protection Board on or about the 2nd of October, 1979, found Petitioner guilty of said charges, and as Petitioner is informed and believes upheld the termination of the Petitioner.

6. Thereafter, Respondent adopted said recommendation.

7. The right to institute this proceeding is specifically authorized by Title 28 Section 1331, Title 28 Section 2670, Wright and Millers Federal Practice, Section 3573, Rule 23(b)(2), Moore's Federal Practice, Wright and Millers Federal Practice, Section 4101, Rule 18(a) Moore's Federal Practice, Rule 23(a) Moore's Federal Practice, Rule 15(a) Moore's Federal Practice, Wright and Millers Federal Practice, Section

1245, Wright and Millers Federal Practice, Section 2314, Title 28 Section 1346(b), Title 28 Section 1653, Title 42 Section 1981 and 1985, Rule 12(h)(g) Moore's Federal Practice, Wright and Millers Federal Practice, Section 1311, Title 42 Section 2000e-16(c).

8. Petitioner excepts and objects to the report, findings, and recommendations of said Merit Systems Protection Board, and requests this Court to review said report, findings, and recommendation, and to vacate, cancel, and annul the decision dismissing Petitioner from his position as GS-4 Guard, on the grounds that the testimony presented at the hearing did not constitute sufficient legal evidence to sustain the determination and all other grounds set forth herein.

9. Petitioner is advised and believes that said report, findings, recommendations and determination were irregular and illegal, and were not sustained by sufficient legal evidence, all of which appears from the following:

   a. There was no competent proof of all the facts necessary to be proved in order to authorize the making of the determination dismissing Petitioner from his office.

   b. Said Merit Systems Protection Board failed to conduct hearing in a quasijudicial manner and permitted the introduction of hearsay and self-serving statements which were of probative character.

   c. Each and every one of the charges made against Petitioner were

charges involving trivialities, minor mistakes of judgment or errors, and each of said charges, either singly or collectively, even if established, were insufficient to authorize or justify the dismissal of Petitioner from his said position.

10. Petitioner, in all respects, denied and still denies the charges made against him and supported this denial by competent and proper testimony at the hearing.

11. Petitioner is advised and believes that:

    a. The report findings, recommendations of said Merit Systems Protection Board and determination of Respondent are irregular, illegal, arbitrary, capricious, void and of no legal effect.

    b. Said report, findings, recommendation, and determination have not

been sustained by sufficient legal evidence.

c. The hearing violated the Constitutional Rights of Petitioner in that if conflicts with the 1st-8th Amendments to the Constitution of the United States, and said report, findings, recommendation, and determination were based on prejudicial hearsay and improper testimony.

12. Petitioner avers that said report, findings, recommendation, and determination are contrary to law and contrary to the weight of evidence, that upon all of the proof and evidence, there was such a preponderance of proof against the existence of those facts found against Petitioner, with respect to said charges, as not to warrent a finding affirming the

existence thereof, and that a finding thereupon against Petitioner upon the verdict of a jury rendered in an action in the United States District Court would be set aside by the Court as against the weight of evidence.

13. If each and every on of the charges had been established by competent evidence the proof thereof would be insufficient to warrent and authorize the dismissal from his said position.

14. In making the determination the rights of Petitioner were violated to the prejudice of the Petitioner, and the authority conferred on Respondent has not been pursued in the mode required by the Equal Employment Opportunity Act of 1964 in that numerous errors were committed in receiving evidence, which subjected Petitioner to evidence of an incompetent,

irrelevant, prejudical character; consequently, no valid basis existed for sustaining any of the charges made against him.

15. No other charges against Petitioner other than the charges hereinbefore referred to, have ever been filed against him.

16. The determination made hereinbefore described was not made in a civil action or special proceeding by a Court of Record or a Judge of a Court of Record; it was not made in a criminal matter; it finally determined the rights of the Petitioner with respect to the matters to be reviewed; and it cannot be adequately reviewed by an appeal to a higher Court or some other body or office.

17. By reason of the foregoing, your Petitioner's dismissal was illegal, wherefore, Petitioner prays that this Court review the aforesaid determination of Respondent, and subsequent to such review, issue its Writ of Mandamus directing that Petitioner be given his salary from January the 31, 1979, to the date of his reinstatement, and further directing his said reinstatement.

THE CONSTITUTIONAL QUESTION IS SUBSTANTIAL

The constitutional question presented to the Supreme Court of the United States is a substantial one for the Federal Government.

PUBLIC INTEREST IN THE CASE

Whenever unreasonable governmental interference threatens the fundamental

constitutional rights of those accused in mental disorder it is a matter for major public concern and interest.

ASSIGNMENT

The Petitioner has been deprived of his liberty to practice his chosen profession of law enforcement without the requisite constitutional safeguards of trial and due process of the law in violation of his constitutional rights.

AGREEMENT

The United States has agreed by the Fifth Amendment to the Constitution that, Petitioner, a citizen of the United States by birth shall not be deprived of life, liberty, or property without due process of the law.

REASON FOR GRANTING THE WRIT

The decision of the Circuit Court below conflicts with the Fifth Amendment to the Constitution of the United States and upholds the Government's imputation of mental disorder against the Petitioner without the requisite constitutional safeguards of a fair trial before a jury. This decision of the Ninth Circuit Court of appeals raises significant and recurring problems for the government and those accused in metal disorder who are entitled Fifth Amendment Constitutional process under the legal "Residuum Rule" in adverse administrative actions under authority of the Administrative Procedure Act and Civil Service Reform Act and those persons entitled to have Seventh Amendment Constitutional process in actions against the United States Government under authority of the Equal Employment Opportunity Act, Tort Claims Act, and

Employee's Compensation Act where Congress has waivered the Sovereign Immunity of the United States and made the government liable the same as a private individual.

CONCLUSION

For these reasons a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted

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